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May 18, 2017

San Francisco Bay Conservation and Development Commission  
455 Golden Gate Avenue, suite 10600  
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Re: Third Application for Amended Permit (Amended from first application dated September 16, 2015 and from second application dated July 13, 2016) re: Required Shoreline Access from Lewelling Boulevard, in the City of San Leandro, over Heron Bay Homeowner Association Property (BCDC Permit No. 1992.057, dated July 5, 1994).

Gentlepersons:

This Third Amended Application is presented on behalf of Heron Bay Homeowners Association (hereinafter referred to as "the HOA" or "the Association" or "Heron Bay") in the matter of the alleged non-compliance of the Association with San Francisco Bay Conservation and Development Commission, Permit No. 1992.057 (alternately referred to on the Recorder's Copy of the Permit as Permit No. M92-57 (hereinafter referred to as "the permit"). This correspondence will constitute the Association's Third Application for an Amended Permit seeking approval of as-built conditions that will put the HOA in compliance with the terms of the original permit and of several new additions. The HOA notes that their original application was presented on September 16, 2015. That application was rejected by BCDC. The second application was presented on July 13, 2016. That application was rejected by the BCDC as incomplete. Subsequently the Association received a letter from BCDC dated April 14, 2017 labeled in part "Termination of Standardized Fine Process to Resolve Violations of BCDC Permit No. M1992.05." This Third Amended Application is submitted within 35 days of the date of the above referenced correspondence.

For the record we would note that the original permit was issued to Citation Homes, the original developer and builder of the Heron Bay complex, which is comprised of 629 homes. There was no existing construction of homes prior to the issuing of the subject permit. Citation Homes turned over control of the complex to the original homeowner controlled Board of Directors more than twenty years ago with no reference whatsoever to the existing permit 1992.057. The current HOA had no knowledge of the existence of the permit nor or any alleged failures to comply until mid-summer 2014 when the HOA made application to the City of San Leandro for the installation of entrance gates at the complex because of growing crime on the grounds of the HOA. Apparently both the City of San Leandro and BCDC were unaware that the various entities were then in violation

of the referenced permit. At that time the Association was advised by BCDC of the existence of the permit and alleged violations of that permit, in particular violations of the requirements of section F (3) Public Access Improvements. Since that time the HOA has been meeting with and working with the staff of BCDC and the City of San Leandro to achieve mutually agreeable solutions to the existing problems. Since that time various items of correspondence from BCDC, including the most recent letter of April 14, 2017, seem to infer that the Association has somehow been less than diligent in their pursuit of compliance with the permit terms. This is simply not the case. At all times since the HOA became aware of BCDC's claim of permit non-compliance, and particularly during the past months, the HOA has been diligently working on proposals that would satisfy all permit needs and best serve all members of the community who may wish to use the bay trails. Let us state again at this point that Heron Bay Homeowners Association does now and has always vigorously supported the public use of the bay trails. The HOA has undertaken no action, proposed or actual, that would disrupt or interfere with the bay trail access. The difficulty has been preparing a plan that would incorporate the as-built condition of Bayfront Drive, an as-built condition that was approved by the City more than 20 years ago, with the requirements of BCDC, the planning guidelines of the City of San Leandro and the needs and rights of the HOA and the owners of Heron Bay homes.

As the staff of BCDC is well aware, several proposals have been made to the City involving the use of an attendant on Heron Bay property and the placement of a kiosk to enable that attendant to have shelter and a restroom area. The concept was that the presence of an attendant would provide some safety and security to the residents of the complex without affecting the free use of the bay trails by the general public. As stated by BCDC in their April 14, 2017 notice, BCDC has been kept aware of those various applications by the HOA and by the City of San Leandro. BCDC has recognized that as late as December 19, 2016, the City of San Leandro City Council denied the pending application to place the kiosk on Heron Bay property, completely removed from the area of the public access easement. Heron Bay would like to point out to BCDC that this denial does not represent the complete story. In fact the City Planning Department Staff approved the placement of the kiosk as presented. The City Council denied the pending permit stating that they would not approve any plan that allowed the attendant at the kiosk to stop cars for any purpose, even if that purpose was to determine whether those non-residents were entering the private property for a legitimate purpose which would have included the use of the bay trails. The intent, as earlier described to BCDC staff, was to have the attendant hand out approved information on the trails and to be welcoming to the public to the use of the trails. The City Council also wanted the HOA to further inform their members in several languages of the HOA's intent. It is important to note that the City Council denied the application without prejudice. The HOA has spent the past several months preparing for a resubmittal addressing the concerns of the City Council, keeping in mind that the Planning Staff has already approved the concept of the plan.

However, at this time the Association is presenting this Application for an Amended Permit without the kiosk/attendant proposal. The Association will continue to work for a kiosk solution that will satisfy the City's requirements, but this Amended Permit will not

anticipate a kiosk. Should the City later approve the concept of a kiosk with an attendant who will not stop vehicles for any purpose, the Association will advise BCDC of their intent and, if required, will ask for another amendment to the exiting amended permit. It is hard to imagine how this later proposal, if presented, would affect BCDC's and the public's interest. The kiosk would not be located on public ground, it would not be located within the area of the public access easement and there would be no stopping of vehicles or blockage of the public's use of the bay trails. Nevertheless, considerations related to the kiosk are irrelevant at this point as no kiosk plan is currently pending. In fact, no application to the City is currently pending. This Amended Application should be considered on its own merits as seeking compliance with the language and spirit of the original permit requirements.

The purpose of this Third Amended Permit Application is to resolve the allegations of lack of compliance in the area of Public Access Improvements to the satisfaction of BCDC and the HOA. We would note that another check in the amount of \$600.00 is enclosed representing the application fee (2X) as suggested by BCDC and as confirmed by Ms. Maggie Weber in a telephone conversation with the undersigned on May 18, 2017. (See attachment Exhibit A).

For the record the HOA is also aware that the City of San Leandro was in default on certain terms contained in Permit no. 14-89, issued on March 7, 1990, as amended through June 28, 2000, and as recorded on October 6, 2000 as document no. 2000302674. It is the Association's understanding that the City has resolved its permit issues by providing six parking spaces in the roundabout at the beginning of Bayfront Drive, albeit over the objection of the HO. It is important and interesting to note that the City to date has not informed the HOA where those six parking spaces are to be located and, in fact, no parking has been yet marked or provided by the City in the roundabout. While the HOA does not approve of nor appreciate the concept of parking in the roundabout for a variety of safety reasons, the HOA will not further comment on this agreement at this time.

To recap the HOA understands that Permit 1992.057, section F (3)(c) required a minimum 12-foot wide, handicapped accessible, pedestrian and bicycle path, with a minimum 8-foot wide, asphalt, primary use area and a minimum total of 4 feet of shoulder. In fact the as-built condition contains a 36-foot wide two-lane asphalt street; curb and planter beds which are 12-feet wide on the north side of Bayfront and a strip on the south side of Bayfront that is approximately 5 ½-feet wide. These dimensions generally run from the beginning of Bayfront Drive to the bay trails. It is obvious that the as-built conditions, approved by the City more than 20 years ago and incorporated into the recorded map for Tract 6810 (a subdivision of parcels 2 and 3 of parcel map 6828) represent a far superior solution to the concept of bay trail access than that originally contemplated in the existing permit. The HOA is informed and believes that BCDC does not seriously want the HOA to tear out the as-built improved condition to revert to the more primitive access description described in Permit 1992.057. The HOA after carefully considering the comments and requirements of BCDC over the past several years and after consideration of the requirements of the existing permit request that the

following amendment to the permit be approved. The HOA offers two options at the pleasure of BCDC. Option 1 represents the strong preference of the Association.

#### Option 1.

1. That the as-built condition of Bayfront Drive consisting of a 36-foot wide two-lane asphalt street; curb and planter beds which are 12-feet wide on the north side of Bayfront and a strip on the south side of Bayfront that is approximately 5 ½-feet wide be approved and become a part of the amended permit in lieu of the original requirement of a minimum 12-foot wide, handicapped accessible, pedestrian and bicycle path, with a minimum 8-foot wide, asphalt, primary use area and a minimum total of 4 feet of shoulder. The as-built dimensions generally run from the beginning of Bayfront Drive to the bay trails.

2. The HOA will paint bicycle sharrows on both lanes of Bayfront Drive, the exact location of which to be approved by BCDC, within 30 days of the approval of the amended permit. The HOA, at the pleasure of BCDC, in addition to or in lieu of the bicycle sharrows would add a painted 6' wide bay trail access bicycle lane along the curb that blends in with the existing bike lane along Lewelling Boulevard for bicycle use during the hours the bay trail is operational.

3. The HOA will erect bay trail way-finding signage along the bay trail access easements as per BCDC standards and as approved by BCDC. At the direction of BCDC, this approved signage will be placed at the interpretive shelter, at the entrance to the bay trail at the westerly termination of Bayfront Drive, on the roundabout as required, on Lewelling as directed by BCDC and approved by the City of San Leandro and such other locations as directed by BCDC. This signage, subject to availability, will be placed within 60 days of the approval of the amended permit.

#### Option 2.

At the outset let us state that the HOA considers Option 2, which reverts Bayfront Drive to the original permit requirements a far inferior choice to that of Option 1. This Option basically conforms to the original permit requirements and, therefore, does not need an amended permit. Nevertheless, the HOA proposes should BCDC prefer this option:

The HOA would remove 4' of existing landscaping between the vertical curb face and the existing sidewalk. They would further remove 2' of existing landscape between the existing sidewalk and the existing wall leaving approximately 2' of landscape adjacent to the existing wall. The HOA would pave the two described areas of former landscaping to provide a 12' wide public access along the length of Bayfront Drive. The HOA would have to move 4 existing street lights and realign electrical equipment boxes in the remaining landscape area to avoid encroachment into the airspace above the now 12' wide public trail easement. While this option represents the strict language of the original permit, it is hard to say that this is the most beneficial to the public and the residents of San Leandro. This option creates a harsher, less visually pleasing entrance to

the bay trails and adds nothing to the actual public access. Please note that this existing access has been in place for almost twenty years without complaint from the public. One would ask if it is really necessary to revert to a less attractive, less inviting environment for the sake of compliance with a forgotten permit? Heron Bay HOA urges BCDC to approve Option 1 of the amended permit application. Heron Bay HOA believes that the plan as outlined in Option 1 offers compliance and betterment for all parties and the public.

#### Issue of Public Parking.

In discussion with Ms. Maggie Weber on May 18, 2017, BCDC was advised that Heron Bay HOA's current application for an amended permit does not include the addition of any public parking at the Westerly end of Bayfront Drive. Ms. Weber asked that the HOA explain this lack of additional parking. The following is submitted in explanation.

BCDC will remember that the proposed offer of additional parking on HOA property was at the suggestion of the HOA during the time period that the first kiosk to be located in the middle of the roundabout was under consideration. Neither BCDC nor the City of San Leandro had ever suggested or planned for parking on Heron Bay property. There is no language in the original permit that demanded parking and no parking is shown on any approved map of the area. In fact the HOA has always maintained that the public access as demonstrated on the recorded map for Tract 6810 specifically recognizes that there is no public vehicle access on Bayfront Drive and that the use of Bayfront for public vehicle access is permissive only. Nevertheless, in conjunction with the approval of a kiosk, the HOA was willing to consider some public parking on Bayfront. Every single letter, document or application ever produced by the HOA made it clear that any parking would be subject to the kiosk/attendant approval.

The reason for this condition is both legal and practical in nature. All of the streets within Heron Bay are private and belong exclusively to the Association. The HOA has always maintained and continues to maintain that there is no public parking allowed on Heron Bay streets. This fact has never been challenged by any authority or agency. All residents of Heron Bay have parking placards issued to them which allow limited parking on the streets in certain conditions, the details of which are not important to this discussion. California Vehicle Code Section 22658 controls issues related to public parking on private streets and the removal of vehicles. Section (a) (1) states that if private property is not open to the public and if the proper signage is displayed, that the owner of the private property may remove a vehicle that is parked in a restricted area (which all of Heron Bay would be). There are no time restrictions as to when a vehicle that is illegally parking may be towed. If, however, private property is open to the public, then the owner of the property is generally required to give 96 hours notice of parking violations before any tow may take place. Heron Bay vigorously enforces its right to tow any vehicle not displaying an owner or visitors permit from the private streets. The HOA knows that if a vehicle does not display the proper permit that it is considered an illegally parked vehicle and they may tow it.

The concept of the kiosk and an attendant from the outset anticipated that the attendant could briefly stop non-resident vehicles from entering the private streets only to determine the parties' intent. If the persons were entering to use the bay trail, then they would have been provided with welcoming information and would have been directed to one of the new parking spaces along Bayfront. The HOA even discussed preparing a script to be approved by BCDC for use by the attendant. The HOA could then have continued to remove other non-permitted vehicles from the complex other than those directed to the parking spaces. However, as the City, and presumably BCDC, opposed the concept of a brief stop of vehicles, which in the opinion of the HOA would have done nothing to discourage public access, but which would have encouraged public access in the addition of public parking, the concept of public parking became impossible. An attendant would have identified the persons parking in the available spaces. Without the attendant being able to stop and inquire and direct parking the HOA would have no idea who was parking in the available spaces. Because the property would now be considered to be open to the public, the HOA could not remove cars from anywhere on the premises without giving statutory notice of 96 hours notice (a provision of Section 22658) which would make parking enforcement impossible. Additional parking spaces were always conditioned upon the approval by all parties of a kiosk and an attendant who could make reasonable inquiry and who could direct members of the public to the available parking spaces. Because of the City's insistence on a no-stop policy for any attendant, the HOA has no choice but to remove the concept of additional parking from the amended permit application.

While not a condition of the amended permit application, in the spirit of full disclosure, the HOA discloses that it may erect license plate readers on columns and possibly other security cameras strategically along Bayfront Drive on HOA property so as to not encroach on easements of record. These devices, if placed, will be completely off the public right-of-way and will be sited so as to avoid encroaching upon any easements of record. Such devices will have no effect on the public access to the bay trails.

#### Permanent Guarantee.

The HOA is aware that one of the permit requirements was a permanent guarantee of public access. Again, the HOA was unaware of this requirement until first notice in 2014. The Association has always supported public access to the bay trails and is more than happy to execute a permanent guarantee as for public access and to buffer areas as described in Segment 2 and Segment 3 in Special Condition II.F.1. In discussions with Ms. Weber on May 18, 2017, it was agreed that Heron Bay was not able to prepare the permanent guarantee until such time as the issue of the amended permit was resolved. The HOA has agreed to have the easement, once determined, surveyed and to prepare the recordable document for BCDC's approval. This guarantee will be prepared within 30 days of approval of the amended permit application or when the issue of the exact location and nature of the easement is determined. Again, this is a non-issue for the HOA as the HOA is ready, willing and able to execute such an agreement as soon as the necessary information has been decided upon.

This document and the attached copy of the fees paid constitute the Heron Bay Homeowners Association application to BCDC for an Amended Permit. If BCDC has any questions regarding the materials submitted or the intent of the Association in so filing, please do not hesitate to contact the undersigned. The HOA reserves the right to submit additional materials or clarifying statements during the pendency of the application.

Very truly yours,



A. Alan Berger

Attorney for Heron Bay Homeowners Association

Cc: Client

AAB/ceb